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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 446th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 13 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 3 (continued)

1. Mr. GRIFFITH (Observer for Australia) said that article 3 appeared to involve two issues. The first was the extent to which parties had freedom to contract generally, and the second the extent to which particular articles affected their freedom to contract into the regime of the Model Law and also to contract out of it. The Working Group appeared to have accepted that they had freedom to contract out, but that left his delegation with some doubts of the kind identified by the United Kingdom in its written comments and the annex to them (A/CN.9/347, pp. 55-56, 63).

2. His delegation was keen to have an opportunity to discuss fully the basic liability to refund money, dealt with in articles 13 and 16. An important subsidiary consideration was that, where parties to a credit transfer had freedom to contract directly between themselves, the arrangements which they arrived at might affect the derived rights of third parties elsewhere in the chain of transmission of the payment order. An extreme example of what he had in mind would be a situation in which two banks agreed between themselves that no liability should arise for, say, six months after the date on which the money should be transmitted. It was vital for the Model Law to give basic protection to those derived rights. By endorsing the Working Group's proposal for article 3, the Commission would be committing itself to considering what provisions of the Model Law should be subject to the freedom which article 3 afforded, notwithstanding the acceptance of the general principle that parties had freedom to contract out of the Model Law regime.

3. The CHAIRMAN replied that the Working Group had gone into the implications of the words "by agreement of the affected party" and had concluded that only when "agreement" meant "consent" would it become binding on the party concerned. It seemed to him that the point made by the observer for Australia had in fact been addressed in the draft, although the actual wording which catered for it might not be entirely satisfactory.

4. Mr. SCHNEIDER (Germany) observed that the words "freedom of contract" were understood by different delegations in different ways. It was generally agreed that mandatory rules should protect certain special interests which required such protection, as well as third parties not directly involved in a credit transfer contract but nevertheless affected by the payment transaction concerned. Apart from that, parties should be free to organize their contractual relationships as they saw fit. Under those circumstances, the fewer mandatory rules the Model Law contained the better; everything else might be left to a provision of the kind in article 3. There was a difference between that and the approach advocated by the United Kingdom.

(Mr. Schneider, Germany)

5. The kind of contract normally used in mass payment transactions was the standard form of contract. The Commission of the European Economic Community had recently proposed a directive aimed at curbing the use of unfair clauses in standard forms of contract; the directive did that by reference to rules, which although not mandatory, were deemed to be a fair way of safeguarding the interests of the parties. The fact that all the rules in the Model Law would have certain implications for such a process of control pointed to the importance of deciding on what would and would not be mandatory, and of examining the content of the non-mandatory rules.

6. A second equally important point was that if the Model Law contained too many mandatory rules, banks in States which adopted it might simply advise their customers to revert from electronic systems to cheque payments when making funds transfers. One of the principal aims of the Commission was to encourage the use of electronic funds transfer and a wholesale abandonment of it would have deplorable repercussions on the whole payments system.

7. Looking at the Model Law, he did not see any circumstance at all - not even what was contemplated in paragraphs 2 and 3 of article 4 - which justified a mandatory provision. Protection was no more necessary for large transnational companies than it was for small regional banks. What was being discussed was not protection of consumers, but of strong customers perfectly able to look after their own interests. Consumer protection was quite a different matter, on which his delegation would be perfectly willing to agree to the adoption of mandatory rules.

8. Mr. GREGORY (United Kingdom) noted that the Chairman had mentioned the notion of consent. That was important in regard to the way in which the Commission looked at article 3. If the words "with the consent" were added between the word "agreement" and the words "of the affected party", some of his delegation's concerns and, he thought, those to which the observer for Australia had drawn attention would be eliminated. If the Commission wished the provision to be understood as having that meaning, it should make that clear.

9. Mr. ABASCAL ZAMORA (Mexico) asked how a contract between two parties could become binding on a third party which had not given its consent to be bound.

10. Mr. GREGORY (United Kingdom) explained that under English law, such a contract could not affect a third party's rights or obligations directly. However, as the observer for Australia had pointed out, it might affect them indirectly.

11. Mr. BURMAN (United States of America) said that his delegation broadly associated itself with the remarks made by the representative of Germany. With regard to the addition which the United Kingdom had just suggested, his delegation had the same difficulty as that mentioned by the representative of Mexico. The exact wording of the article was very important. It would be most unfortunate if the text was to imply an impediment to an agreement

(Mr. Burman, United States of America)

between two parties to a credit transfer transaction - A and B - because of its possible indirect effects on other parties C, D or E. That would effectively preclude the capacity of persons in the real commercial world to conclude such agreements.

12. The CHAIRMAN observed, in regard to the United Kingdom suggestion, that the intention of the Working Group had been that the wording of article 3 at present before the Commission should express the idea which the United Kingdom wished to bring out. To him, that seemed clear from the fact that the article was worded in the singular: it spoke of "affected party". To take, for example, the situation where an originator and an originator's bank agreed on something which the beneficiary's bank should do in a chain of transfer, the inference was that if the beneficiary's bank gave effect to that agreement it was authorized to do so, but if the beneficiary did not agree to the act in question he would not be bound by it.

13. Mr. LIM (Singapore) endorsed the views expressed by the observer for Australia. He foresaw misunderstandings arising from the use of the word "agreement" in the article as presently worded. He believed that the use of the word "consent" would minimize that possibility.

14. Mr. GRIFFITH (Observer for Australia) said the fact was that the expression "affected party" seemed to refer to one of the two parties directly making the agreement; if it was meant to refer to third parties who might be concerned, as the United Kingdom representative thought was the case, either the wording must be amended or the point must be made very clear in the commentary. Otherwise, there would be a real danger of that meaning being overlooked. His delegation would prefer the wording itself to be amended, on the lines suggested by the representative of the United Kingdom.

15. Mr. SCHNEIDER (Germany) asked whether the words "affected party" were to be taken in their economic or in their legal sense. Contractual relationships normally only created rights and duties between the parties to the contract and there were not more than one or two rules in the Model Law in which the third party had a right against a party with whom no contractual relationship had been entered into.

16. Mr. BERGSTEN (Secretary of the Commission) said that while the titles of the articles - in the present instance "variation by agreement", not "variation by consent" - had no legal standing, they did hold clues as to the intention of the Working Group. That was indicated to a considerable extent by the example given in paragraph 2 of the Secretariat's comments on the article (A/CN.9/346, p. 24). To begin with, "consent" had a different connotation from "agreement". The assumption had been that there would be something in the nature of a contract, an agreement in one form or another. In the Secretariat's example, the agreement to which the beneficiary's bank was not party provided that the order might be processed by account number alone, and the implication was that a discrepancy between the beneficiary's name and the account number led to financial loss. His personal understanding had been that in such a situation the originator, by making that agreement

(Mr. Bergsten, Secretary of the Commission)

with the originator's bank, gave up one of the rights he would have under the Model Law. The agreement was certainly not with the person who received the benefit - in that instance the beneficiary's bank. That led him to conclude that it was the party adversely affected, not the one that received the benefit, that was meant by "affected party".

17. Mr. GREGORY (United Kingdom) asked what the effect on the originator's bank would be if, with the present wording, there had been such an agreement between the beneficiary's bank and the sender's bank.

18. Mr. BERGSTEN (Secretary of the Commission) said that the originator would not then be affected at all.

19. Mr. LE GUEN (France) remarked that the French version used the words "si la partie intéressée y consent" where the English version used the words "by agreement of the affected party".

20. The CHAIRMAN felt that the problems that had been raised were adequately covered by the ordinary law of contracts. It seemed clear that if one was not a party to an agreement one was not bound by it.

21. Mr. SCHNEIDER (Germany) said that the problem was that the word "affected" could cover anyone who was affected economically, even indirectly. Surely what was meant was "agreement between the parties".

22. Mr. POTYKA (Observer for Austria) suggested that the words "of the affected party" might be deleted.

23. Mr. LIM (Singapore) said that, although parties to an agreement normally could not bind third parties, when the Model Law was enacted as a statute in a particular country it would override that general rule of law.

24. The CHAIRMAN asked whether there was any opposition to the suggested deletion of the words "of the affected party".

25. Mr. GRIFFITH (Observer for Australia) thought that the words "of the affected party" were important.

26. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) suggested that the wording "by agreement of the parties concerned" should be used.

27. The CHAIRMAN pointed out that the written comments submitted by Japan (A/CN.9/347, p. 35) contained a proposal that the words "agreement of the affected party" should be replaced by the words "agreement of the parties". In the light of the discussions, that solution seemed to deserve consideration.

28. Mr. DUCHEK (Observer for Austria) thought that what was intended was clear: to allow the rules to be changed by the parties concerned. The Commission should not spend too much time trying to achieve perfection of drafting on such a point when there were, in his view, much more serious

(Mr. Duchek, Observer for Austria)

problems that would require its attention if it was to draw up a model law that would be widely acceptable.

29. Mr. GREGORY (United Kingdom) said that, without prejudice to his country's written comments concerning the issues raised by article 3 (A/CN.9/347, pp. 55-56), he would like to suggest, as a contribution towards solving the present drafting problem, that the wording "... the rights and obligations of the parties to a credit transfer may be varied by agreement" might be used, with no reference being made to an "affected party".

30. Mr. BURMAN (United States of America) said that he had difficulties with that suggestion. The problem was that the Commission had not defined who the parties to a credit transfer were. Would the term cover, for example, so-called credit transfer systems?

31. Mr. KOMAROV (Union of Soviet Socialist Republics) agreed with the previous speaker, and felt that the wording just suggested by the United Kingdom representative raised new problems. He preferred the text as it stood.

32. The CHAIRMAN said that, in the light of the discussion, he would like to suggest that the first part of the text should remain as it was and that the final words "by agreement of the affected party" should be replaced by the words "by agreement of the parties concerned". The other problems that had been raised would be covered by the ordinary law of contracts.

33. Mr. GREGORY (United Kingdom) asked whether, if that suggestion were adopted, it would mean that an agreement between the beneficiary's bank and its sender to rely on numbers only would be binding on the originator.

34. The CHAIRMAN said that that question would be decided by reference to the ordinary law of contracts. If the originator agreed to that, he was volunteering to be bound by his agreement. He asked whether he could take it that the Commission agreed that the words "by agreement of the affected party" should be replaced by the words "by agreement of the parties concerned".

35. Mr. BERGSTEN (Secretary of the Commission) said that he would like to mention a linguistic point affecting some of the language versions. In the French and Spanish versions of article 3, the word "agreement" was translated differently in the text of the provision from the way it was translated in the title. In the French and Spanish versions of the text suggested by the Chairman, the word "agreement" should presumably be translated in such a way that it would have the same meaning as in the title.

36. Mr. LE GUEN (France) said that that was a drafting point; there was in fact no difficulty in translating into French the new wording suggested by the Chairman.

37. Mr. LOJENDIO OSBORNE (Spain) said that there was no problem in Spanish either with regard to the translation of the word "agreement" in the amended text suggested. However, the expression "the parties concerned" was not completely clear. Perhaps it would be better to say something like "the rights and obligations derived from the relationships included in a credit transfer may be varied by agreement of the parties".

38. Mr. VASSEUR (Banking Federation of the European Community) said that, in French at least, it would be unsatisfactory to have the word "party" in the singular at the first mention and in the plural at the second.

39. Mr. YIN Tieou (China) said that the wording suggested by the Chairman caused no problems in the Chinese language.

40. Mr. SKELEMANI (Observer for Botswana) asked whether a beneficiary was a party to a credit transfer.

41. The CHAIRMAN said that a beneficiary was not a party in the sense intended. The rights of the beneficiary were covered by the general law.

42. Mr. SOLIMAN (Egypt) said that, in the Arabic version too, the word "agreement" was translated differently in the text of the article from the way it was translated in the title. In the amended text, the term should be brought into line with the title.

43. The CHAIRMAN said that such drafting points would be taken care of by the Drafting Group.

44. Mr. SCHNEIDER (Germany) said that it was difficult to separate drafting from substance unless the concepts were clear. The Commission should have an opportunity to discuss the text again after any drafting adjustments were made.

45. The CHAIRMAN said that that would certainly be possible if a problem arose. However, if he heard no objection, he would assume that there was agreement that the text should be amended to read, in the English version, "Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the parties concerned".

46. It was so decided.

Additional article on interpretation

47. Mr. ABASCAL ZAMORA (Mexico) recalled that a decision had been taken in the Working Group to include in the Model Law a text on uniform interpretation. The additional article on that subject proposed by his delegation in its written comments (A/CN.9/347, p. 42) was based on the United Nations Convention on Contracts for the International Sale of Goods and other relevant international instruments. Although the Model Law was not a convention, its purpose was not dissimilar, in that it was intended to have universal application. Every effort should be made to obviate discrepant interpretation of the Model Law by the courts of States which adopted it.

48. Mr. SCHNEIDER (Germany) said that it was important to bear in mind the fact that the Model Law affected both private and public international law. In his delegation's opinion, the Mexican proposal was satisfactory from both points of view.

49. Mr. PELICHET (Hague Conference on International Private Law) said that, while a provision of the kind proposed by the delegation of Mexico might logically have its place in a convention, it might not be appropriate in a model law, which must always be compatible with domestic legislation.

50. Mr. AZZIMAN (Morocco) said that his delegation had some hesitation with regard to the Mexican proposal. For example, it was unsatisfactory to define the term "bank" and subsequently to rely on the courts to generate a uniform jurisprudence on the subject.

51. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation also had doubts about the Mexican proposal. It would prefer that reference be made to the international dimension of the relations with which the Model Law was concerned.

52. Ms. KRAG JORGENSEN (Denmark) said that no specific provisions were made in Danish law for the interpretation of international conventions.

53. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that his delegation would have difficulty in accepting the Mexican proposal.

54. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the text should be left as it was.

55. Mr. ADEDIRAN (Nigeria) said that a provision on the subject should be included in order to prevent divergent interpretations of the Model Law.

56. Mr. ERIKSSON (Observer for Sweden) said that his delegation supported the suggestion made by the representative of the Soviet Union. The question of the applicability of the Model Law was perhaps best left to judges in the courts of the countries concerned.

57. Mr. SOLIMAN (Egypt) said that the general ideas embodied in the proposal by Mexico should be placed in a preamble to the Model Law and not in the text itself.

58. Mr. GRIFFITH (Observer for Australia) pointed out that, when Australia had enacted the UNCITRAL Model Law on International Commercial Arbitration, the interpretation of the instrument had been provided for as follows: "For the purposes of interpreting the Model Law, reference may be made to the documents of: (a) the United Nations Commission on International Trade Law; and (b) its working group for the preparation of the Model Law." His delegation joined those delegations which considered the article proposed by Mexico to be inappropriate for inclusion in the body of the Model Law.

59. Mr. ABASCAL ZAMORA (Mexico) withdrew his delegation's proposal.

60. The CHAIRMAN said that, unless he heard any objection, he would take it that the Commission did not wish to include a text on interpretation in the Model Law.

61. It was so agreed.

Organization of work

62. The CHAIRMAN announced the establishment of the Drafting Group, which would consist of the representatives of China, France, the Islamic Republic of Iran, Mexico, Morocco, Singapore, Spain, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America.

Article 16 bis

63. The CHAIRMAN recalled that at its 444th meeting the Commission had considered, under article 2, the question of adding to the Model Law a definition of the term "interest".

64. Mr. BHALA (United States of America) introduced the following text, which it proposed should be added to the Model Law as article 16 bis: "Unless otherwise agreed, 'interest' means the time value of the transaction amount in the funds or money involved. Interest shall be calculated at the rate and on the basis customarily accepted by the local banking community for the funds or money involved."

65. The text had been prepared by an ad hoc drafting group on the basis of the Guidelines on International Interbank Funds Transfer and Compensation of the International Chamber of Commerce (ICC) and the written comments of Mexico on article 16 (A/CN.9/347, p. 43). It used the term "funds or money" instead of "currency" because the words "funds" and "money" were defined in article 2(i); that definition covered monetary units of account and also referred to the rules of intergovernmental institutions. In response to points raised in the discussion at the 444th meeting, the text avoided mentioning the interbank interest rate as such, but that rate was implicit in the words "the time value of the transaction amount ... customarily accepted by the local community". The proposed text omitted the word "country", which was the point of reference of the ICC Guidelines, because technically there was no country for a monetary unit of account. That would also help to solve the difficulty of selecting a rate when dealing with, for example, eurodollars.

66. Mr. NAGAI (Japan), observing that the interest rate would depend solely on the customs of the local banking community, asked whether, if the local banking community worked on the basis of a currency, the calculation could be based on that currency.

67. Mr. BHALA (United States of America) confirmed that that was the case.

68. Mr. VASSEUR (Banking Federation of the European Community) welcomed the proposed text. Citing the example of a case recently handled by the French courts concerning interest on a dollar transaction between a bank in

(Mr. Vasseur, Banking Federation of the European Community)

Czechoslovakia and a bank in Lebanon, he suggested that the words "local banking community" might usefully be replaced by the words "international banking community".

69. Mr. SOLIMAN (Egypt) felt that the text proposed by the United States representative could advantageously be included among the definitions in article 2.

70. Mr. POTYKA (Observer for Austria) said he was concerned about the use of the words "transaction amount", which were not used in the Model Law itself. Also, although the words "funds" and "money" had been defined in the Model Law, he did not think it appropriate to use them as a replacement for the term "currency". Finally, it should be specified somewhere in the Model Law what the appropriate local banking community was.

The meeting rose at 5.05 p.m.

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Twenty-fourth session

SUMMARY RECORD OF THE 447th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 14 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 16 bis (continued)

Article 4

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The meeting was called to order at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 16 bis (continued)

1. The CHAIRMAN said that the Drafting Group had made minor changes in the wording of the definition of the term "interest", to be included in the text as article 16 bis.

2. Mr. ABASCAL ZAMORA (Mexico) said that, as amended by the Drafting Group, the definition of "interest" read: "Unless otherwise agreed, 'interest' means the time value of the amount of the payment order in the funds or money involved. Interest shall be calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved."

3. That version took account, in particular, of the comment by the observer for Austria that the term "transaction amount" was not sufficiently precise. The second amendment involved the deletion of the word "local" in the second sentence and was intended to deal with a comment by the observer for the Banking Federation of the European Community that the word "local" was inappropriate in the context of a law of international scope.

4. Mr. VASSEUR (Banking Federation of the European Community) said that he would have preferred that the word "local" were replaced by "international" rather than merely deleted.

5. Mr. GREGORY (United Kingdom) said that the phrase "of the payment order" in the first sentence should be deleted. The first sentence would then read: "Unless otherwise agreed, 'interest' means the time value of the amount in the funds or money involved." That would avoid the problems entailed by the vagueness of the term "transaction amount", while at the same time avoiding the possibility of a discrepancy between the amount of the payment order and the amount actually transferred.

6. Mr. SCHNEIDER (Germany) said that the definition of the term "interest" was insufficiently precise since, in the first place, it did not specify what was meant by the "local banking community" and, secondly, it gave no indication of how interest was to be calculated or what kind of arrangement was involved. At the very least, it should be specified whether the bank concerned was that of the originator or of the beneficiary; the former would be his delegation's preferred choice but, in the context of the current text, the beneficiary's bank might be more appropriate.

7. Mr. HERZBERG (Observer for Israel) said that the first sentence of the definition was unnecessary. Furthermore, in the second sentence, one of the two terms "funds" or "money" could be deleted without detracting from the meaning of the sentence as a whole.

8. Mr. LOJENDIO OSBORNE (Spain) said that, while he could accept the proposed paragraph in principle, he wondered where in article 16 it would be inserted. In addition, it should be made clear whether it was intended that interest should be calculated in respect of the creditor or the debtor.

9. Mr. HERZBERG (Observer for Israel) said that the term "time value" took insufficient account of other components - such as risk and inflation - which were normally included in the calculation of interest. Rather than attempting a theoretical definition, it would be better to propose a practical method of calculating the interest.

10. The CHAIRMAN said that the inflation component was irrelevant to the calculation in view of the short periods of time involved in the cases covered by the Law. Interest would certainly differ according to the periods of time involved, but it had been generally felt that the phrase "time value" dealt with the problem adequately. As for the question as to where the paragraph should be inserted, the current proposal was that it should be included as article 16 bis, but it might just as well be transferred to article 13, which also referred to the concept of interest.

11. Mr. DUCHEK (Observer for Austria) said that the current text of the paragraph deviated considerably from the International Chamber of Commerce (ICC) Guidelines on which the original Mexican revision had been based. The ICC text, which specified that the banking community in question was the local one, was much clearer than the text before the Commission.

12. Mr. HUANG Yangxin (China) said he endorsed the views expressed by the representatives of Spain and Germany and the observer for Israel that the paragraph should offer a method of calculating interest, rather than an abstract definition. Interest should be calculated on the basis of the interbank loan rate.

13. The CHAIRMAN said that it had already been agreed that it was unacceptable to stipulate the use of a single standard, such as the interbank loan rate, for calculating interest. That was the original reason for the proposal to use a broader phrase such as "at the rate or on the basis customarily accepted".

14. The following wording might provide a satisfactory compromise: "Unless otherwise agreed, 'interest' means the time value of the amount in the funds or money involved, which is calculated at the rate and on the basis customarily accepted by the banking community." That sentence could be included in the text as a definition, the word "shall" being deleted to eliminate the impression that it was intended as a rule. The retention of the phrase "Unless otherwise agreed," would ultimately depend on the decision regarding article 3.

15. Mr. LE GUEN (France) said that the phrase "Unless otherwise agreed," might also cause problems in connection with article 16(7), which stated that the provisions of that article might be varied by agreement to the extent that the liability of one bank to another bank was increased or reduced.

16. The CHAIRMAN said that, while he recognized that the phrase in question did indeed leave a way open for parties to take action contrary to article 16(7), further discussion should be postponed until the matter of exclusivity was discussed, particularly with respect to article 16.

17. Mr. ABASCAL ZAMORA (Mexico) said that, if he understood the paragraph correctly, it meant that the parties could, by previous agreement, stipulate the rate of interest to be applied.

18. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to include the paragraph, as most recently amended, in article 2 of the text, i.e. as a definition.

19. It was so decided.

Article 4

20. The CHAIRMAN said he hoped that the problems raised by the representatives of Morocco and the Islamic Republic of Iran in connection with the term "purported sender" could be dealt with by the Drafting Group. The Commission had already discussed those aspects of article 4 which related to forgery and to the authority of one person to bind another, but had concluded that it was not necessary for the Model Law to provide a rule on either question. It had decided, however, that in article 4(2)(a) the words "under the circumstances" should be added after "a commercially reasonable method of security".

21. Structural changes had been suggested by the observer for Finland and the representative of Japan. The Finnish suggestion was that the obligations set out at the beginning of paragraph 5 should be linked to the previous paragraph by the introductory phrase "Subject to the previous paragraph,". The Japanese proposal was that the first sentence of paragraph 5 be transferred to paragraph 1 in the interests of clarity and as a means of introducing the two concepts of "source" and "error" at the very beginning of the article, which would then go on to deal with the concept of "source" in the next three paragraphs and with "error" in the fifth paragraph. The word "However," would have to be deleted from the first - formerly the second - sentence of paragraph 5.

22. Mr. HERZBERG (Observer for Israel), having endorsed the Japanese proposal that the first sentence of article 4(5) should be moved to paragraph 1, suggested that, if so, paragraphs 4 and 5 of article 4 might well be combined.

23. The CHAIRMAN said that paragraphs 2, 3 and 4 of article 4 dealt with the source of a payment order while paragraph 5 covered the question of error. It might therefore be impractical to combine paragraphs 4 and 5.

24. Mr. LIM (Singapore) said that, since the first sentence of article 4(5) stated how a sender was bound under the terms of paragraphs 1 and 2, transferring that sentence to paragraph 1 would place the matter outside the scope of paragraph 2. He was unable, therefore, to support the Japanese proposal.

25. Mr. BHALA (United States of America), having endorsed the remarks of the representative of Singapore, said he agreed with the Chairman's interpretation that an altered payment order was an unauthorized one. The text of the article was satisfactory in that respect.

26. Mr. IWAHARA (Japan) withdrew his delegation's proposal, on the understanding that, as the representative of the United States had said, an altered payment order was considered to be an unauthorized one.

27. The CHAIRMAN invited the Commission to consider article 4(1).

28. Article 4(1) was adopted.

29. The CHAIRMAN invited the Commission to consider article 4(2). He recalled that a number of drafting suggestions had been made by the observers for Finland and Sweden and the representative of Canada. The observer for Finland had suggested that the words "under the circumstances" be added after the word "security in article 4(2)(a) and that the words "complied with" in article 4(2)(b) be replaced by "performed properly". The Swedish suggestion was that the word "safe" be inserted before "commercially reasonable" in article 4(2)(a), while the Canadian proposal was that the word "provided" in article 4(2)(a) be deleted.

30. If he heard no objection, he would take it that the Commission wished to add the words "under the circumstances" to article 4(2)(a).

31. It was so decided.

32. Mr. GREGORY (United Kingdom), speaking on the suggestion that the words "complied with" be replaced by "performed properly", said he recognized that it was necessary to make it clear that an order must in fact have been authenticated if the purported sender were to be considered as being bound. He proposed that a new subparagraph be added to that effect.

33. Mr. BHALA (United States of America) asked the observer for Finland if she would clarify the purpose of her suggestion, after which there should be further discussion of the related United Kingdom proposal.

34. Ms. KOSKELO (Observer for Finland) explained that the purpose of her proposal was to make it clear that the receiving bank had to bear the risk in the event of falsely positive authentication resulting from a technical malfunction in the receiving bank.

35. The CHAIRMAN said that it might be thought that, if there had been a technical malfunction in the receiving bank, then that bank could not be regarded as having complied with the authentication requirement.

36. Mr. BOSSA (Observer for Uganda) said he wondered whether the concerns of the observer for Finland might not be satisfied by the addition of the word "duly" before the words "complied with".

37. Mr. BHALA (United States of America) said he thought it desirable to retain the wording "complied with". The valid point made by the observer for Finland should be reflected in the comments and be borne in mind during the discussion on standards of commercial reasonableness.

38. Ms. KOSKELO (Observer for Finland) explained that she had been referring not so much to the commercial reasonableness of a system as to the fact that there could be a technical malfunction in a basically good system, and that might cause problems.

39. Mr. ERIKSSON (Observer for Sweden) said that the term "commercially reasonable" was rather imprecise, as pointed out in the Secretariat's comments (A/CN.9/346, p. 27, para. 9), and greater clarity would be achieved by adding the words "safe and" before it.

40. He had been somewhat surprised to hear a speaker state that the term "commercially reasonable" might be used in connection with the problem of forged signatures since the term did not, he thought, provide enough guidance. Furthermore, the Working Group had already agreed that paragraphs 2 to 4 of article 4 would not apply in cases of forged signatures.

41. Mr. KOMAROV (Union of Soviet Socialist Republics) pointed out that, if the word "safe" were added, it might imply that some commercially reasonable methods were not safe, and that itself did not seem very reasonable.

42. Ms. KRAG JORGENSEN (Denmark) said that it was important that the method should be safe as well as commercially reasonable; she therefore supported the Swedish suggestion.

43. Mr. LOPEZ ROCA (Observer for Colombia) said that, since article 4(2)(a) mentioned a "commercially reasonable method of security", it was hardly necessary to add the word "safe".

44. Ms. KOSKELO (Observer for Finland) said she supported the suggestion in principle but suggested that some such word as "reliable" would be more appropriate than "safe", or perhaps the two could be combined. Because of the vagueness of the term "commercially reasonable", her delegation had prepared an indicative list of the factors that should be taken into account in assessing what was commercially reasonable.

45. Mr. ABASCAL ZAMORA (Mexico) said he fully agreed with the representative of the Union of Soviet Socialist Republics and the observer for Colombia. To add the word "safe" would create confusion. He did not understand what could be meant by a commercially reasonable method that was not safe. Incidentally, it was not true that the Working Group had agreed that paragraphs 2 to 4 of article 4 would not apply in the case of a handwritten signature.

46. Mr. BISCHOFF (Observer for Switzerland) said he agreed with the representative of Mexico. A safe system meant a faultless system, and that did not exist. An expert would be able to determine whether a method was commercially reasonable but could not determine whether it was safe.

47. Mr. LENNARD (Observer for Australia) said he supported the Swiss view. The term "commercially reasonable" would include reliability in all circumstances. The comments on the Model Law should indicate that reliability was a factor relevant to commercial reasonableness.

48. Mr. ERIKSSON (Observer for Sweden) said that he would not pursue his suggestion, on the understanding that the comments would comprise a statement that the concept of a commercially reasonable method should include the notion of security of authentication.

49. The CHAIRMAN said that all the members of the Commission accepted that "commercially reasonable" incorporated the idea of "safety", a fact that would be reflected in the summary records and in the commentary.

50. Mr. BURMAN (United States of America) said that he agreed with the views expressed by the representative of the Union of Soviet Socialist Republics. He would return to the commentary on article 4(2) after the discussion of article 4(3) in order to ensure that the understanding of the Commission was correctly recorded.

51. Mr. AL-NASSER (Observer for Saudi Arabia) said that the banks in his country regarded the expression "commercially reasonable" as too vague.

52. Mr. DE BOER (Netherlands) said he thought that it had been agreed that the question whether signature comparison could be considered a commercially reasonable method of authentication was to be discussed in the context of article 4.

53. The CHAIRMAN said there had been an understanding at an earlier stage that signature comparison could be an authentication procedure, if so agreed by the parties. Whether or not it was a commercially reasonable method would depend on the circumstances, such as the amount of the sum involved.

54. Mr. ERIKSSON (Observer for Sweden) said that, in his country, signature comparison would never be a "commercially reasonable method". The differing views on what constituted a "commercially reasonable method" of authentication clearly revealed the vagueness of the term.

55. To solve the problem of forged signatures, an added sentence stating that paragraphs 2 to 4 of article 4 did not apply to forged signatures was needed.

56. The CHAIRMAN said he thought that the words "under the circumstances" would accommodate different practices and concepts of what was "commercially reasonable". Moreover, signature comparison might be expressly excluded from the definition of authentication in article 2(j), as the observer for Finland had suggested.

57. Mr. ABASCAL ZAMORA (Mexico) said he could not agree that paragraphs 2 to 4 of article 4 did not apply to signature comparison. It was unacceptable that the parties should be prohibited from agreeing that comparison of signatures was a means of authentication, covered by the requirement that it should be commercially reasonable. The alternative would be to place an undue

(Mr. Abascal Zamora, Mexico)

restriction on the will of the parties. There was also the question of defining a "signature". Modern techniques, such as the comparison of electronic signatures, were much more secure. He therefore thought the text should be retained as it stood.

58. Ms. KOSKELO (Observer for Finland) said that, although she had raised the issue in relation to article 2(j), it would be more appropriate to resolve the problem in the context of article 4.

59. The question was not whether the procedure was commercially reasonable or not but, rather, who was to bear the risk. It would not be appropriate to apply the same rules for loss allocation in the case of forged signatures, because signatures were not secret but public and thus easily subjected to misuse. She was therefore in favour of keeping to the traditional rule whereby the receiver who relied on a signature was the one to bear the risk.

60. She therefore supported the Swedish suggestion that paragraphs 2, 3 and 4 of article 4 should not apply in the case of forged, handwritten signatures. The issue related only to signatures that were handwritten. Electronic signatures, and others which might be developed, were much safer and would be covered by paragraphs 2 to 4 of article 4. In any case, if signature comparison was excluded from article 4(2) to (4), the parties could still agree otherwise, as provided in article 3.

61. Mr. SCHNEIDER (Germany) said that, in practice, payment orders were commonly given by tape, in writing or by telephone. In the case of written payment orders, the only proof of authenticity was the signature, so it was a commercially reasonable method of authentication under the circumstances. In the case of telephone orders, reliance was placed on a key word and voice recognition. That was commercially reasonable practice, for example, in serving customers in the travel business. He could not agree with the observer for Sweden that, contrary to normal practice in many countries, banks should not be able to rely on a signature.

62. He did, however, support the general rule that the method of authentication should be commercially reasonable and secure. Nevertheless, he also thought that the parties should be free to agree on the use of a method which was not commercially reasonable. He therefore proposed that article 4(3) should be amended to read: "The parties are permitted to agree, by written agreement only, that paragraph 2 shall apply if the authentication is not commercially reasonable."

63. The CHAIRMAN said that the situation in the case of a telephone order was a question of interpretation. He could not agree with the representative of Germany on that point.

64. Mr. VASSEUR (Banking Federation of the European Community) said that the problem of payments being made on the basis of forged signatures certainly existed. Approximately 25 per cent of payment orders in France were paper based. French jurisprudence distinguished between two cases. In the first

(Mr. Vasseur, Banking Federation of the European Community)

case, where there was a clear discrepancy between the signature on the order and the specimen signature - an obvious forgery - a receiving bank which failed to detect the forgery and executed the order would be responsible. In the second case, that of a perfect forgery undetected by the receiving bank, the law had ruled that the receiving bank should bear the loss because the purported sender had not sent the order.

65. He suggested that the question of forgery should be covered in the draft Model Law, a distinction being made between the two cases he had described, together with a clear statement as to who would be liable in each case.

66. The CHAIRMAN said that the question might give rise to a basic conflict between the civil law and common law approaches, which could not easily be solved. It would be better, therefore, to leave the question of risk allocation to traditional law.

67. Mr. DE BOER (Netherlands) said that the first case came under the rule that the bank must comply with a method of authentication. If the second case was a matter for national case law, forgery could be excluded from article 4(2) to (4). He would therefore support the Swedish suggestion.

68. Mr. HERZBERG (Observer for Israel) said he agreed that it would be better to leave the legal situation as it stood.

69. Mr. LOJENDIO OSBORNE (Spain) said that article 4(4) could not be kept as it was if the problem of forgery were included, because it concerned the payment order, whereas a forgery presupposed a handwritten signature. However, perhaps the most important element was the burden of proof, and he therefore supported the Swedish suggestion. According to article 4(4) the sender had to prove that the order resulted from the action of another person, and the conditions seemed to him excessive.

70. The question of forgery should be treated separately, to avoid conflict with article 4(4); and the more substantive issue of burden of proof could be discussed at a later stage.

71. Mr. CONOBOY (United Kingdom) said that his delegation's views had been stated earlier in the discussions. He noted that, while a signature would not be regarded as a commercially reasonable method of authentication in Sweden, the observer for Sweden accepted that it might be so regarded in other countries. That was the way in which the Working Group had intended that the Law should operate and he was satisfied to leave article 4 as it stood.

72. Ms. KRAG JORGENSEN (Denmark) said that, as she understood it, article 4(1) dealt with the matter of a person becoming a sender and being bound by a payment order issued by another person with authority, but it did not prescribe when and how a person became part of a transaction. That had apparently to be left to the national law and the national law would therefore regulate forgery.

(Ms. Krag Jorgensen, Denmark)

73. According to article 4(2), however, there must be an agreement between the parties, under national law, to accept an authentication procedure. Thus, the sender and his bank would be able, under the rules of national law, to accept a certain procedure which allowed for the problem of forgery.

74. Mr. BERGSTEN (Secretary of the Commission), referring to the discussions on article 4 in the Working Group, said that paragraph 1 was the basic rule in that it stated that the sender was bound by a payment order sent by himself or by another person who had the authority to bind him. The Working Group had felt that the question of what person had the authority to bind the sender was essentially a question of agency, the legalities of which were too complicated for the Model Law to handle. The Working Group had simply accepted the consequences if the other person actually had the authority. There was no mention of authentication, merely of the factual situation.

75. According to paragraph 1, if the person sending an order was not the purported sender but someone who purported to be an agent but did not have the authority, the bank would incur the risk. Most of the discussion had turned on the circumstances in which the risk of the false or unauthorized message should be shifted from the bank to the purported sender.

76. The Working Group had been concerned almost entirely with electronic and computer communication, and there had been no discussion of oral or written communications. The representative of Mexico had correctly stated that the Working Group had not decided that a written payment order and a signature did not come within the scope of paragraphs 2 to 4: there had been no positive decision; the subject had not been discussed. In his opinion, there was no need for any change in the text.

77. Paragraph 1 and paragraphs 2 to 4 were concerned with the allocation of risk. It was essential to decide who would bear the risk in the case of non-authenticated payment orders acted on by a bank. If the Commission did not wish the rule, devised in the context of the computer, to cover the traditional situation of the written payment order also, it would be best to say that paragraphs 2 to 4 did not apply to the latter case, which would then be covered by paragraph 1 only.

78. Mr. ABASCAL ZAMORA (Mexico) said that, under article 4 as currently drafted, a bank executing an order with a forged signature would be liable whether the forgery was a good one or not. Article 4 provided that the parties could agree on a means of authentication and there was no need to prevent them from agreeing on a method which included comparison of signatures, together with passage of the risk, as appropriate. He could see no reason to change the text.

79. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that, at an earlier meeting, his delegation had stressed the need to use a commercially reasonable method for comparing signatures. On the question of allocating risk, if the risk were borne by the receiving bank, the cost of credit

(Mr. Tchernychev, Union of Soviet Socialist Republics)

transfers would greatly increase. If the person receiving the payment order bore the risk, that party would have to insure against it and would urge his the bank to use a commercially reasonable method other than signature comparison, which would make the bank's service to its client far more expensive, and would also extend the duration of the operation. The result would be an increase in the cost of the operation to the sender, which was not desirable.

80. The CHAIRMAN said that no one was suggesting that there should never be any comparison of signatures. The question was whether paragraphs 2, 3 and 4 of article 4 should apply to handwritten signatures or not.

81. Following a show of hands which indicated a majority in favour of excluding handwritten signatures from the scope of paragraphs 2, 3 and 4, he said that there was no need to complicate matters by adding a further paragraph. It would suffice if the article were modified along the lines suggested by the Secretary.

82. He also asked the Drafting Group to insert the words "as a sender" into the second line of the opening sentence of paragraph 2 before the word "if", provided it did not consider the insertion to be a matter of substance.

83. He said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 2 as amended.

84. It was so decided.

The meeting rose at 12.40 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 448th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 14 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 4 (continued)

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 4 (continued)

1. The CHAIRMAN invited the Commission to consider article 4(3). On the question of contracting-out of that provision, in his view it was the clear intention of the text as it stood that the parties were not permitted to agree that paragraph 2 of the article should apply to an unreasonable authentication. He would submit that it must be assumed that article 4(3) was one of the provisions referred to in the phrase "except as otherwise provided in this law" in article 3.

2. There was a proposal by Canada (A/CN.9/347, p. 6, sect. XII) to reword the paragraph in order to spell out its procedural effect, but he thought that the Commission would prefer for the time being to avoid getting into questions of procedure in the Model Law.

3. The United States of America (A/CN.9/347/Add.1, pp. 13-14) proposed the deletion of article 4(3), arguing that the parties should be permitted to agree on a procedure that was less than "commercially reasonable" if their own cost-benefit analysis persuaded them to do so. At the previous meeting, the Commission had added the words "under the circumstances" to paragraph 2(a) of the article (A/CN.9/SR.447, para. 30); the question arose whether, that being so, the parties' procedure should not be regarded as "commercially reasonable" in the circumstances. He hoped that, in the light of the previous meeting's discussions, the United States might reconsider its proposal for the deletion of the paragraph.

4. There was also a proposal from Japan on article 4(3) (A/CN.9/347, p. 36, para. 6), but he suggested that the Commission should first decide on its general approach to the paragraph.

5. Mr. BHALA (United States of America) said that the Chairman's interpretation of article 4(3) would make it easier for his delegation to accept the paragraph, but it still felt some concern. Supposing a customer - say a small business - told its bank that it would like to accept a less than "commercially reasonable" procedure for reasons of cost, and the bank agreed, then according to the Chairman's interpretation the agreement could be deemed to be commercially reasonable; as his delegation read the present text, however, the bank would have to tell the customer that it was precluded by the law from agreeing to the customer's request. Some might argue that the customer might not be sophisticated enough to assess the risks correctly. The point needed clarification.

6. The CHAIRMAN thought that a procedure might be commercially reasonable under given circumstances even if it were not in line with the prevailing criteria for commercial reasonableness. The paragraph was intended to provide a minimum safeguard, but not to prevent particular circumstances from being taken into account.

7. Mr. ABASCAL ZAMORA (Mexico) supported the United States proposal, which seemed reasonable. If the Commission wished to keep paragraph 3, he would like to reserve his delegation's position until the final amended text of paragraph 2 was available.

8. Mr. SCHNEIDER (Germany) said that he was sympathetic to the United States proposal. If "reasonableness" was understood objectively, it would be for a judge to determine whether a given procedure was reasonable. That was how he interpreted the present text; a procedure did not become reasonable simply because a party agreed to it. He therefore agreed with the United States view that it should be made clear that the customer might agree to a procedure which was not objectively reasonable. He had made that point at the previous meeting (A/CN.9/SR.447, para. 62).

9. Mr. VASSEUR (Banking Federation of the European Community) reminded the Commission that his delegation too had proposed the deletion of article 4(3) (A/CN.9/347, p. 67). It should be possible for parties to adopt in certain circumstances a method whose objective reasonableness could be disputed. Why could not, for example, parties agree that payment orders could be given by telephone and accepted on the basis of voice-recognition? It could be provided that such an agreement must be in writing, as proposed by the German delegation.

10. The CHAIRMAN wondered what the position of those who wanted article 4(3) deleted was in regard to agreements which were manifestly unfair and might be invalidated under general contract law.

11. Mr. IWAHARA (Japan) supported the interpretation of article 4(3) given by the Chairman. A minimum standard of security was needed so that customers could rely on the machinery of international credit transfers. There must be some mandatory rules, and commercial reasonableness, taking into account circumstances, should be a mandatory requirement. There might be cases where a customer with real bargaining power wished to negotiate a reduction in his bank charges, but such cases could be catered for as just indicated by the Chairman.

12. Mr. HERZBERG (Observer for Israel) expressed general agreement with what had been said by the representatives of the United States and Germany. Although the Chairman's suggestions were reasonable as far as they went, it would be important to make the text clearer; otherwise the paragraph should be deleted. Moreover, as he understood the text, authentication was not necessarily required. If that was so, why could not the parties agree to have a "loose" system of partial authentication?

13. Ms. KOSKELO (Observer for Finland) thought it was clear that the parties would be unable to agree to let paragraph 2 apply if there was no authentication at all. The risk in that case would be borne by the receiving bank.

14. She took the view that article 4(3) should be retained. The hypothetical case described by the United States delegation did not seem very realistic. Usually, a small customer of modest means would not be in a

(Ms. Koskelo, Observer for Finland)

position to enter into negotiations with the bank. The reality was that the bank's standard terms would govern the situation. If variation by agreement was allowed in such a case, the bank would merely have to obtain the customer's consent to standard terms. The criterion of commercial reasonableness must therefore be kept as a minimum standard, with no contracting-out permitted. She agreed that the standard should be interpreted flexibly enough to allow circumstances to be taken into account, including a situation where a customer expressly insisted on a particular method.

15. She would like to make a drafting suggestion in connection with the idea discussed at the previous meeting to insert in the article a provision that would exclude authentication by way of signature from the scope of paragraphs 2 to 4. She thought that paragraphs 2, 3 and 4 should be reformulated: the present paragraph 4 should follow paragraph 2 so that the two paragraphs could be taken together; they should be followed by a new paragraph stating that they did not apply where the authentication consisted of a comparison of a signature with a specimen signature; and those three paragraphs should follow the present paragraph 3.

16. Mr. DE BOER (Netherlands) said that his delegation believed that the effect of paragraph 3 would be to ensure that the parties were careful and perhaps preserved a record of the transaction, and that for that reason it should be retained.

17. Mr. ERIKSSON (Observer for Sweden) said that he agreed with the comments made by the observer for Finland.

18. Mr. SCHNEIDER (Germany) said that the best solution might be to insert a provision stating that the parties would not be held to have agreed that paragraph 2 should apply unless the authentication was commercially reasonable under standard terms of contract. However, the parties should also be given the possibility of agreeing on terms which did not conform to the criterion of commercial reasonableness.

19. Mr. LENNARD (Observer for Australia) said that an objection could be raised to the suggestion made by the German representative on the ground that there was no agreed definition of standard terms of contract.

20. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that he favoured the retention of paragraph 3 even if it did restrict the parties' freedom of action.

21. Mr. BURMAN (United States of America) said that courts would be the arbiters of what constituted commercial reasonableness. In practice, negotiations did take place between banks and clients with regard to authentication.

22. Mr. BHALA (United States of America) said that, while the customer should be the object of prime concern, it should also be borne in mind that the interests of the client included not only security but also facility of access to credit transfer services.

23. Mr. LIM (Singapore) said that banks should be in a position to determine which authentication procedures were binding on them and which were not, and thus whether or not article 4 applied in a given instance. In any case, the criterion of reasonableness must be applied in a way which made commercial sense.

24. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the viewpoint of the representative of Germany. However, security was an aspect which banks should not ignore if they were to retain their customers, and that notion fell within the scope of commercial reasonableness.

25. Mr. ADEDIRAN (Nigeria) suggested that, in order to cater for the concerns expressed by those delegations which opposed the inclusion of paragraph 3 of article 4, the words "under the circumstances" should be added to the paragraph so as to qualify the words "commercially reasonable".

26. Mr. KOMAROV (Union of Soviet Socialist Republics) welcomed that suggestion.

27. Mr. ERIKSSON (Observer for Sweden) said that it would be inadvisable to amend paragraph 3 in the manner suggested by the German representative because the resulting text might produce different results in different cases. The best solution would be to adopt the existing text with the amendment suggested by Nigeria. Such a solution would almost certainly lead to the results sought by the United States delegation and would probably be the only course acceptable to the majority of delegations.

28. Mr. VASSEUR (Banking Federation of the European Community) commented that a reference to standard form contracts would be appropriate for Germany and also for Switzerland and Belgium, but not for France, because French banks did not have such highly developed general conditions as those used by German banks.

29. He felt that it would be useful to incorporate in the Model Law a definition of "commercially reasonable" that was closely based on the content of article 4A-202(c) of the Uniform Commercial Code of the United States. That would be preferable to the amendment suggested by Nigeria, although the latter would provide a useful guide for readers of the Model Law in determining what circumstances were reasonable.

30. Mr. DUCHEK (Observer for Austria) said that his country approved the amendment proposed by Nigeria.

31. Mr. BURMAN (United States of America) pointed out that, although his delegation found the provisions of article 4A-202(c) of his country's Uniform Commercial Code relevant, it had not proposed that the definition it embodied should be incorporated in the Model Law.

32. Mr. SCHNEIDER (Germany) said that his delegation believed that decisions taken by a court would take into account objective criteria as to what was commercially reasonable. It was important that the provisions on authentication should cover payment orders made by means of telephone calls, a system which worked very well in Germany. He hoped that point would be brought out clearly in the Commission's report.

33. The CHAIRMAN said that he would take it, unless he heard any objection, that the Commission wished to retain paragraph 3 of article 4 and to add to it the words "under the circumstances" proposed by Nigeria; he suggested that the addition should be made at the end of the sentence.

34. It was so agreed.

35. The CHAIRMAN invited the Commission to consider article 4(4). He drew attention to the written comments by Canada on the words "present or former employee of the purported sender" (A/CN.9/347, p. 7, sect. XIII, second paragraph).

36. Mr. ABASCAL ZAMORA (Mexico) said it was necessary to consider the implications behind the suggestion by Canada that those words were too narrow in scope. If the question was whether the scope of the provision should be expanded to include persons related to the purported sender, his delegation would agree, and that would just be a matter of drafting. However, the point raised by Canada had not been dealt with expressly in the Working Group.

37. Mr. BURMAN (United States of America) said that his delegation had a recommendation which he felt would accommodate the comments made by Canada and also avoid discussion of the law of agency, namely that the commentary should contain a statement explaining that the word "employee" should be construed broadly. It was well known that payment orders were often initiated by persons who were not, strictly speaking, employees of the sender. A broad definition in the commentary along the lines he had suggested would eliminate lengthy discussion and complicated drafting of the Model Law itself.

38. Mr. ABASCAL ZAMORA (Mexico) suggested that the Drafting Group should be asked to examine the Canadian suggestion.

39. The CHAIRMAN said he felt that the Drafting Group would have difficulty in dealing with the suggestion unless delegations clearly indicated their views on the matter.

40. Mr. ERIKSSON (Observer for Sweden) said that his delegation could support the United States proposal provided that the definition of the word "employee" was not not too broad and that care was taken not to go beyond what Canada had suggested.

41. Mr. BURMAN (United States of America) said that his delegation's proposal was rather more far-reaching than the Canadian suggestion and would specifically include agents authorized to act on behalf of the sender, with particular reference to those corporations which used electronic or computerized transfer systems set up by specialists.

42. Mr. ERIKSSON (Observer for Sweden) said that his delegation could not accept anything broader than what Canada had suggested.

43. Mr. BURMAN (United States of America) said that a substantive discussion appeared to be necessary to determine whether the term "employee" was understood to refer simply to employees, officers and directors of the sender or whether it included external agents using the sender's facilities as well.

44. Ms. KOSKELO (Observer for Finland) felt that the problem which the proposal of the United States delegation addressed did not in fact exist because article 4(1) covered situations involving external agents.

45. Mr. GREGORY (United Kingdom) said that the concern expressed by the United States delegation would be met if, in line with the suggestion made by Canada in its written comments, the scope of article 4(4) was extended to include persons whose relations with the purported sender might have enabled them to obtain improper access to the authentication procedure. He asked the Secretary for clarification regarding the status of a commentary to the Model Law.

46. Mr. BERGSTEN (Secretary of the Commission) said that in the history of the Commission there had only been one commentary on a finished text prepared by the Secretariat, namely the Commentary on the Convention on the Limitation Period in the International Sale of Goods. If the Commission so wished, the Secretariat would prepare a commentary on the Model Law.

47. Mr. GREGORY (United Kingdom) had no objection to the proposal that the point under consideration should be dealt with in a commentary. However, the Model Law should be drafted in terms that could be understood readily without undue emphasis being placed on external documents.

48. Mr. BURMAN (United States of America) said that his delegation was prepared to work on the basis of what Canada had suggested in its written comments. In his view, the Commission's report, rather than a commentary, should reflect the understandings reached among delegations on various points.

49. The CHAIRMAN said that the report would be the document adopted by the Commission. He asked the Rapporteur to ensure, with the assistance of the Secretariat, that it reflected clearly the manner in which the Commission had interpreted the text of the Model Law.

50. He suggested that the Commission continue its discussion of article 4(4) by considering the following amendment: to use the words "any other person whose relations with the purported sender might have enabled him or her to obtain improper access" in order to extend the scope of the reference to employees. That wording was in line with the Canadian suggestion.

51. Mr. ABASCAL ZAMORA (Mexico) welcomed the change suggested by the Chairman.

52. Mr. LOJENDIO OSBORNE (Spain) also supported the amendment suggested by the Chairman. His delegation believed that the reference to employees should be broadened to include directors of the sender and all persons whose functions involved them in the types of procedure at which the article was aimed. At the same time he warned the Commission against broadening the scope of the paragraph too far, since a bank had thousands of employees, many of whom would have no possibility of access to authentication procedures; for that reason the word "employee" was inappropriate and should be dropped. However, if someone such as a window cleaner employed by the sender obtained access to the authentication procedure, he should not be excluded from the operation of the paragraph simply because it was not part of his functions to deal with authentication.

53. Mr. LIM (Singapore) supported the amendments suggested by the Chairman and by the Spanish representative. The word "employee" as it stood was very specific in meaning; in the absence of a definition of it, in his jurisdiction the term would not cover a director or a former director, although it might possibly cover an executive officer. It was illogical that the paragraph should fail to cover directors.

54. Mr. GREGORY (United Kingdom) said that his delegation could accept the amendment suggested by the Chairman if the words "through the fault of the purported sender" were deleted from the paragraph. If the word "improper" was used, they would become superfluous.

55. A reference to "employees" which did not mention directors or officers could certainly give rise to the difficulty which the representative of Singapore had mentioned.

56. Mr. BURMAN (United States of America) suggested that the text would be clearer without the word "improper". The intention was to cover people who had gained access to information or procedures properly, but whose use of it had been improper.

57. Ms. KOSKELO (Observer for Finland) said that the wording suggested by the Chairman would be improved if the words "might have enabled" were amended to read "had enabled".

58. Mr. LIM (Singapore), commenting on the statement made by the representative of Spain, said that it seemed to him that if a cleaner had access to the sender's authentication procedure, was an employee of the sender, and had the keys which would enable him to use the authentication equipment, he would not be someone whom the Working Group had intended to exclude from the operation of the paragraph.

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission approved paragraph 4 of article 4 with an amendment reflecting the substance of what he had suggested; and that the Drafting Group be asked to deal with that and with the other changes which delegations had proposed.

60. It was so agreed.

61. The CHAIRMAN invited the Commission to consider article 4(5). He drew attention to a proposal by the delegation of Finland in its written comments to add, at the beginning of the first sentence, the words "subject to the preceding paragraphs" (A/CN.9/347, p. 17). He wondered whether that change was really necessary because, supposing paragraphs 2, 3 and 4 to be in force, their provisions would surely apply to paragraph 5 also. In addition, the Canadian delegation had suggested in its written comments that the scope of paragraph 4(5) should be expanded to include revocation of a payment order (A/CN.9/347, p. 7). In his view that was correct, since paragraph 4(1) also referred to "revocation of a payment order".

62. Mr. ABASCAL ZAMORA (Mexico) said that the proposal of the delegation of Canada to broaden the sphere of application of article 4(5) was reasonable.

63. Mr. IWAHARA (Japan) said that it would be best if discrepancies in payment orders due to fraud were dealt with in article 4(5); if that was done, alterations to payment orders by unauthorized persons might also be dealt with in article 4(5) instead of in article 4(1).

64. Ms. KOSKELO (Observer for Finland) said that her delegation's suggestion was purely one of drafting. It found the proposed wording awkward and had attempted to find something neater.

65. Mr. ERIKSSON (Observer for Sweden) expressed the opinion that paragraphs 4 and 5 should both include a reference to the revocation order as well as to the payment order, since an employee might send a payment order in favour of himself and be detected, which would require his employer to send out a revocation order.

66. The CHAIRMAN asked if paragraph 5 was acceptable to the Commission with that change.

67. It was so agreed.

The meeting rose at 5 p.m.

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Twenty-fourth session

SUMMARY RECORD OF THE 449th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 17 June 1991, at 10 a.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 1 (continued)

1. The CHAIRMAN recalled that the Commission had decided that the problems that had arisen concerning the definition of a "bank" should be dealt with in the context of article 1 and had asked the representatives of Singapore, the United Kingdom and the United States of America and the observer for Finland to prepare an appropriate text. He drew attention to that text, which was to be found in conference room paper A/CN.9/XXIV/CRP.3.

2. Mr. VASSEUR (Banking Federation of the European Community) said that he had no objection to the draft text.

3. Mr. LE GUEN (France) said that, while he was satisfied with the text, he thought that it might more appropriately be placed as paragraph 2 of article 1, the existing paragraph 2 being renumbered as paragraph 3.

4. Mr. LIM (Singapore), speaking on behalf of the ad hoc drafting group, said that it had decided to add a separate paragraph in order to solve a problem raised by the representative of Mexico. If the provision were placed in paragraph 1 or paragraph 2, the reader might wonder if the application of the Model Law to banks in different States would also apply to an entity which was not a bank.

5. Speaking for his own delegation, he said he would have no objection to the provision being placed in paragraph 2.

6. Mr. GREGORY (United Kingdom) said that he had no strong feelings either way, but the Drafting Group had discussed the question and he would prefer that the provision be included as paragraph 3. Paragraphs 1 and 2 constituted a package on the sphere of application while the new paragraph 3 viewed the sphere of application from a different angle and should logically follow those two paragraphs.

7. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he supported the French proposal. It was more logical to move from the general to the particular - first referring to "bank" and then defining banks, branches and so forth.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished the proposed draft of article 1(3), as it appeared in conference room paper A/CN.9/XXIV/CRP.3, to be inserted as paragraph 2 of that article, the existing paragraph 2 being renumbered as paragraph 3.

9. It was so decided.

Article 2 (continued)

10. The CHAIRMAN recalled that the Commission had reached a substantive decision concerning parts of article 2 and had asked the representatives of Mexico and the United Kingdom and the observer for Finland to prepare an appropriate text. The resultant draft text was to be found in conference room paper A/CN.9/XXIV/CRP.2.

11. Mr. VASSEUR (Banking Federation of the European Community) inquired what had happened to the second sentence of article 2(f).

12. The CHAIRMAN said that the Commission had decided to delete the whole subparagraph in question.

13. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of article 2(f), stating that the Law did not apply to an entity which merely transmitted payment orders, was a useful provision. In the interests of clarity, it ought to be retained somewhere.

14. The CHAIRMAN said that, while the Commission recognized that the second sentence of article 2(f) was important, some of its members had thought that the word "merely" might give rise to problems in connection with the use of SWIFT. It had therefore been agreed that the problem should be resolved by amending subparagraph (a) of article 2 (replacing "operations" in the first line by "payment orders" and the words "carry out" in the fourth line by "implement") and deleting subparagraph (f).

15. Mr. LE GUEN (France) said that he could not recall any discussion in the Commission on the addition of the last sentence to article 2(a) and would like an explanation from the ad hoc drafting group.

16. With respect to article 2 bis, he proposed that the words "and obligations" should be inserted after the word "rights" in the fourth line of paragraph 1.

17. Mr. ABASCAL ZAMORA (Mexico), speaking on behalf of the ad hoc drafting group, said that it had discussed the question whether a reimbursement payment order was part of the original credit and had decided, in the interests of clarity, that it should be a different credit transfer. A number of drafting proposals had been made during the discussions on modifying the definition of intermediary bank in article 2(h), and the group had also been asked to prepare an appropriate text. The result of the discussions was contained in the proposed third sentence under article 2(a).

18. As for article 2 bis, the French representative's comment regarding "rights and obligations" was applicable also in Spanish.

19. Mr. GREGORY (United Kingdom) said that the reference to "rights and obligations" should appear in the English version as well.

20. The CHAIRMAN suggested that the words "and obligations" should be inserted after the word "rights" in article 2 bis (1), in all language versions.

21. It was so decided.

22. Mr. LE GUEN (France) said he was satisfied with the explanation given by the representative of Mexico and withdrew his comment as far as the substance was concerned. He was not certain, however, that the sentence correctly interpreted the ad hoc drafting group's idea and suggested that the wording should be reviewed when the Model Law as a whole was being redrafted.

23. It was so decided.

Article 4 (continued)

24. The CHAIRMAN said that he had discussed with the representative of Japan a point that the latter had raised at an earlier meeting. He had explained to him that article 4(1) provided the basic rule and that all issues related to the question whether or not a payment order could be regarded as having been issued by the purported sender should be governed by the applicable law and fell outside the Model Law. Article 4(5) referred to "error" - which of course included alterations - and the first sentence of that paragraph made it clear that it was subject to the preceding paragraphs.

25. Mr. DE BOER (Netherlands) said it should be made clear that an alteration made during transmission by a third party was not covered by article 4(5).

26. The CHAIRMAN said that that had been the Japanese representative's point. Any discussion on the subject would be unproductive, however, since it would inevitably result in the conclusion that the question whether or not a particular person had authority as an agent to bind the purported sender was a matter for the applicable law, which might differ from country to country.

27. Mr. DE BOER (Netherlands) said that, if a third party changed a message during transmission, the matter should come under article 4(2) to (4) regarding unauthorized payment.

28. Ms. KOSKELO (Observer for Finland) said she understood that the concern of the representative of Japan had been to make it clear that unauthorized alterations of payment orders should come under paragraphs 2 to 4 of article 4 and not under paragraph 5, which dealt with errors made by the sender and transmission errors that were not fraudulent. It should be made clear that unauthorized alterations made during transmission would be covered by the preceding paragraphs of article 4.

29. The CHAIRMAN said he thought that the difficulty had been settled when the Commission had accepted the addition of the words "subject to preceding paragraphs".

(The Chairman)

30. He asked if the Commission wished to delete the square brackets around the words "execution date" in paragraph 6. That date would then be the one on which a receiving bank was required to execute a payment order.

31. Mr. SOLIMAN (Egypt) said that article 4(6) gave indications to both the parties. The receiving bank was required to execute the order and the sender was required to make the payment. The execution date was usually the date on which a bank accepted the payment order. He had no objection to the existing text.

32. Ms. KOSKELO (Observer for Finland) said that paragraph 6 gave rise to what had been termed a problem of circularity with respect to the relations between several provisions in the Model Law. It would be preferable if there were no reference to the payment or execution date in that paragraph and if it simply stated the obligation of the sender to honour the payment order, without any reference to when that should be done. Arrangements concerning the payment varied widely from one situation to another. Such arrangements, possibly bilateral or multilateral netting arrangements, were usually in existence already and payments were made accordingly.

33. Mr. GREGORY (United Kingdom) said that the question of the execution date was indeed part of a complex circular problem in the Model Law and it was difficult to consider paragraph 6 in isolation. As it stood, paragraph 6 indicated that payment was not due until the execution date but also that payment did not have to be made until the bank accepted the payment order. However, if the bank took no action, the rules on acceptance stated that acceptance did not take place until the payment was received.

34. In his view, article 4 concerning the obligations of the sender, articles 6 and 8 concerning acceptance, articles 7 and 9 concerning the obligations of the receiving bank and the beneficiary's bank, article 10 concerning the time of execution and article 16 concerning liabilities on failure to comply with obligations ought to be considered together.

35. For the time being, he proposed that the Commission confine itself to considering the suggestion by the observer for Finland.

36. Mr. BHALA (United States of America) said there could be no question at the current late stage of the Commission's restructuring its work along the lines proposed by the United Kingdom representative. The alleged problem of circularity arose only in the case of deemed acceptance under articles 6(2)(a) and 8(1)(a). The Commission itself had already approved the definition of the word "execute" and the Drafting Group had, perhaps, decided on the definition of "execution date" as well. It was not impossible that the problem of concern to the United Kingdom representative and the observer for Finland might be solved by appropriate drafting.

37. Mr. ABASCAL ZAMORA (Mexico) said that he was unable to accept the Finnish suggestion. He did not agree that there was a problem of circularity as

(Mr. Abascal Zamora, Mexico)

alleged by the representative of the United Kingdom. It would be dangerous if the Model Law contained no provision regarding the execution date, for national legislation would then be applicable and it was not always appropriate. In his own country, for example, the law stipulated that payment should be made 30 days after acceptance.

38. Mr. DE BOER (Netherlands) said that he, too, found it difficult to understand the problem of circularity that was worrying the representative of the United Kingdom.

39. Ms. KOSKELO (Observer for Finland) said that, in the case of payment orders, parties would normally have made advance arrangements regarding the manner in which payment was to be made, arrangements which would also cover the date of payment. Under the Model Law, the sender of a payment order had to pay for it to ensure its acceptance by the receiving bank, so that the structure of the Law gave the parties an incentive to make the necessary arrangements. Such arrangements might alter from situation to situation and it was unnecessary to go into details in the article in question.

40. The second part of the current text was related to the problem of circularity. It was not a question of making major structural changes to the Model Law, but of improving its techical drafting so that the Law could be understood and could function well in practice. For that reason, article 4(6) should begin with a rule concerning the obligation to pay.

41. The CHAIRMAN pointed out that, since the representative of Mexico had referred to situations in which no date was specified, the question was whether the applicable law should be invoked in such cases.

42. Ms. KOSKELO (Observer for Finland) said that, if the general rules of law provided that an obligation to pay would normally not arise early enough for the credit transfer to function, the parties would clearly need to come to some arrangement on the point. She did not think that any problem would arise in real life.

43. The CHAIRMAN said that the second part of article 4(6) was intended to cover the situation in which the parties did not agree on some arrangement.

44. Mr. CRAWFORD (Canada) said he was concerned at the procedure that was apparently being adopted, whereby a decision was to be taken by the Commission on a particular article while a matter of major concern was left unresolved.

45. The CHAIRMAN assured the representative of Canada that no question that seriously affected the utility and validity of the Model Law would be ignored.

46. If he heard no objection, he would take it that the Commission wished to adopt article 4(6), the square brackets being removed.

47. It was so decided.

Article 5

48. The CHAIRMAN said that sub-subparagraphs (b)(i), (ii) and (iii) would be taken together, while sub-subparagraph (b)(iv) would be treated separately. He reminded the Commission of the comments made by the Governments of Finland and Japan (A/CN.9/347, pp. 17-20 and p. 36) regarding the relevance of article 5. It was for the Commission to decide whether article 5 was relevant to all the situations in which the time of payment was important, or whether it was to be made clear that the article applied only within the Model Law.

49. Ms. KOSKELO (Observer for Finland) said that her delegation could not accept the idea that the introductory wording should begin with: "For the purposes of the Model Law". It was essential to make it clear that article 5 related solely to articles 6 and 8 of the Model Law.

50. Mr. DE BOER (Netherlands) said he agreed with the observer for Finland that article 5 should relate to certain articles only, and that the words "For the purposes of the Model Law" would not be enough to achieve that end.

51. Mr. LOJENDIO OSBORNE (Spain) and Mr. ERIKSSON (Observer for Sweden) supported the view that article 5 should relate solely to articles 6 and 8.

52. Mr. BHALA (United States of America) said that his delegation did not share the views of the observer for Finland. Article 5 was an integral part of the Model Law and it worked well. He suggested a three-step analysis: in step one, the question was asked when acceptance occurred, and the answer was supplied in articles 6 and 8; in step two, the question was asked what the sender's obligation was on acceptance, the answer being provided in article 4(6); in step three, the question was then asked when payment of the receiving bank by the sender had occurred, the answer being given in article 5. It was all clearly laid out in the Model Law.

53. The observer for Finland would limit step three to the case of "deemed acceptance", but he could see no reason to do so.

54. Mr. CRAWFORD (Canada) said he agreed with the United States representative that article 5 was useful in respect of the Model Law as a whole. If there were a conflict with general laws, it could be limited to the relationships governed by the Model Law but it should not be restricted to articles 6 and 8.

55. Mr. FUJISHITA (Japan) said he agreed that the application of article 5 should be restricted to articles 6 and 8. The Commission was not competent to consider general provisions on payment in all situations.

56. Mr. GREGORY (United Kingdom) said that, as he had understood the discussions in the Working Group, the purpose of article 5 was to mitigate the effects of "deemed acceptance". The existing wording was thus too broad. The analysis by the Government of Finland of the relationship between article 5 and article 17 (A/CN.9/347, p. 19, third paragraph) raised some legitimate concerns. He therefore supported the proposal that the effect of article 5 should be limited to articles 6 and 8, being unable to see why it was necessary to define the time of payment for other purposes.

57. Mr. BURMAN (United States of America) said that the troubling concept of "deemed acceptance" was complicating the issue. There was a danger not only of a loss of symmetry in the three steps his delegation had outlined but also of a distraction from the need to accommodate newly emerging banking techniques, without which the Model Law would be of limited application from the outset. The high-volume, high-speed computer-based systems, and the new systems of netting, were fundamentally different from the earlier systems used. New legal relationships would arise.

58. Mr. BHALA (United States of America) said, with regard to a comment by the representative of the United Kingdom, that article 17 related to an underlying obligation whereas article 5 dealt with the settlement between the sender and receiving bank.

59. As for the reason for defining the time of payment, the sender would wish to know when the liability arising from acceptance by the receiving bank was discharged. Similarly, the receiving bank wished to know when a receivable was received. In both cases, that question was answered in article 5. It was useful, in the interests of harmonization, for both the sender and the receiving bank to know when the obligation to pay occurred.

60. The CHAIRMAN asked whether the United States delegation wished article 5 to apply to all situations in which the obligation to pay was discharged, including insolvency.

61. Mr. BHALA (United States of America) said that his delegation thought that article 5 should apply to the Model Law only and not to insolvency. It simply did not wish to see any further limitation on the scope of article 5.

62. Mr. ABASCAL ZAMORA (Mexico) drew attention to the report of the Working Group (A/CN.9/344, para. 59) which clearly indicated that the time when the obligation to pay occurred was not restricted to "deemed acceptance".

63. Ms. KOSKELO (Observer for Finland) said that article 5 failed to recognize netting systems, referring them back to the applicable law. That might be regrettable but the Working Group had, in fact, failed to achieve such recognition and article 5 was thus capable of relevance to "deemed acceptance" only.

64. She could not agree that article 5 was not relevant to article 17, since article 5(b)(ii) covered reimbursement by a sending bank of a receiving bank through an account in a third bank. Such a reimbursement would be a separate credit transfer and thus might be covered by the Model Law. However, those two provisions provided a different answer to the question when payment occurred: in article 17, it was the time when the third bank accepted the payment order; in article 5(b)(ii) it could be a different time.

65. The United States representative had explained that the sender and receiving bank must know the time when the obligation to pay occurred. While that was true, article 5 was not germane to the matter. The question was most likely to arise in the event of insolvency, which would be covered by the applicable law.

(Ms. Koskelo, Observer for Finland)

66. The possibility envisaged in article 5 that the obligation to pay might occur on the day following the day on which the credit was available for use was clearly contrary to the general principles of law. It would be difficult, therefore, to adopt article 5 unless it was confined to "deemed acceptance".

67. The CHAIRMAN said it was not clear whether there was a general feeling among the members of the Commission that some form of qualifying phrase was needed in article 5. He suggested, therefore, that further discussion of article 5(b)(i), (ii) and (iii) should be suspended until sub-subparagraph (iv) on the topic of netting had been discussed. A trend might then emerge which would lead to an overall compromise acceptable to all.

The meeting rose at 12.35 p.m.